(1) Supreme Court, U.S.
FILED
00 9 JUNE 30 2000
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No.

IN THE

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that employers are barred from using after-acquired evidence to contest an employee's claim under the Family and Medical Leave Act.

2. Whether the court of appeals erred in upholding a challenged regulation on the ground that the authority of a federal agency to promulgate rules implementing a federal statute encompasses the power to expand the scope of the statute's coverage beyond the limits intended by Congress.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Petitioner is a privately held company and has no parent corporation. No publicly held company owns ten percent or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gemini, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, 1a-26a) is reported at 205 F.3d 370 (8th Cir. 2000). The opinion and order of the United States District Court for the Northern District of Iowa granting summary judgment for the respondent on the issue of liability (App., *infra*, 27a-39a) is reported at 998 F. Supp. 1034 (N.D. Iowa 1998).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. App., *infra*, 1a-26a. On May 23, 2000, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including July 3, 2000. *See* Application No. 99A953. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Family and Medical Leave Act of 1993 (the "FMLA" or "Act"), Pub. L. No. 103-3, 107 Stat. 6, *codified at* 29 U.S.C. §§ 2601-2654, and of the regulations promulgated thereunder, are reprinted in the Appendix pursuant to this Court's Rule 14.1(f). App., *infra*, 40a-54a.

STATEMENT OF THE CASE

The principal question presented by this case is whether the FMLA bars an employer from introducing after-acquired evidence to contradict an employee's FMLA claim merely because the employer chose not to avail itself of the certification procedure created by the

FMLA as an optional dispute-resolution mechanism. The decision below, which effectively converts the optional certification procedure into a mandatory and exclusive binding arbitration, conflicts with other circuit case law, this Court's precedents, and the language and legislative history of the Act. In addition, this case provides an opportunity for this Court to review the court of appeals' troubling and egregiously wrong conclusion that the authority of a federal agency to promulgate regulations implementing a federal statute encompasses the power to expand the scope of the statute beyond the limits envisioned by Congress.

A. The Family and Medical Leave Act

The FMLA gives eligible employees of covered employers the right to take job-protected unpaid leave of up to 12 weeks in any 12-month period for certain specified reasons, including (1) absences resulting from an employee's need to care for a family member suffering from a "serious health condition," and (2) absences resulting from an employee's own "serious health condition" that renders him or her unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(C) & (D); 29 C.F.R. § 825.100(a)(1999). The FMLA also establishes an optional certification procedure whereby employers "may" require employees who request leave on account of a "serious health condition" to provide "a certification issued by the [appropriate] health care provider" that demonstrates the employee's entitlement to FMLA leave. 29 U.S.C. § 2613(a) & (b). If the employer elects to invoke this certification procedure, the employee "shall" provide the requested certification in a timely manner. *Id.* § 2613(a). In addition, the employer may require, at its own expense, a second medical opinion and, in the event of a conflict, a third medical opinion as well. *Id.* § 2613(c) & (d). If a third medical opinion is requested, the Act specifies that "[t]he opinion of the third health care provider . . . shall be considered to

be final and shall be binding on the employer and the employee." *Id.* § 2613(d)(2).

The FMLA renders it unlawful for any covered employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1). Employees are authorized to bring suit to obtain double damages, equitable relief, and attorney's fees against employers who violate the Act. 29 U.S.C. § 2617(a).

B. Factual Background

Gemini is a small manufacturing company with a plant in Decorah, Iowa. Respondent Katherine Thorson worked in Gemini's shipping and packing department. App., *infra*, 2a.

Respondent left work on Wednesday, February 2, 1994, complaining of diarrhea and stomach cramps and went to see a physician. She was absent from work on Thursday and Friday, and returned to work on the following Monday, February 7, with a doctor's note stating "no work" until February 7. On February 7, respondent left work early and returned to the doctor with stomach pain. The doctor ordered tests for Friday, February 11; the tests results were normal. Respondent returned to work on Monday, February 14, with a doctor's note stating "no work" until February 14. App., *infra*, 3a.

Gemini has a "no fault" absenteeism policy that requires employees to limit their absences to five percent of their scheduled working hours in a rolling twelve-month period. On February 18, 1994, respondent was terminated by Gemini for excessive absenteeism in violation of this policy. *Id.* at 2a-3a. Thereafter, on March 9, another doctor concluded that respondent had a small hernia, mild gastritis that could be managed with antacid, and duodenitis, all stress-related. *Id.* at 3a; *see* Pet. C.A. App. 477, 483. Gemini's medical expert subsequently concluded that, during the relevant time period,

respondent was suffering from "an upset stomach . . . without any significant gastrointestinal disease or pathology" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* App., *infra*, 19a.

C. The District Court's Decision

Respondent filed suit in the United States District Court for the Northern District of Iowa against Gemini asserting various claims, including a claim under the FMLA. The district court initially granted summary judgment for Gemini, concluding that respondent could not prove that her illness constituted a "serious health condition." App., *infra*, 3a-4a. That judgment was set aside and remanded for further consideration by the court of appeals. *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141-42 (8th Cir. 1997). On remand, the district court denied Gemini's motion for summary judgment and granted summary judgment for respondent as to liability on the FMLA claim. App., *infra*, 4a. The court held that respondent's stomach illness was a "serious health condition" under the FMLA and that, as a result, her termination for excessive absences (which was based in part on absences during the period she suffered from a "serious health condition") violated the Act. *Id.* After a trial limited to damages, the court awarded respondent damages plus interest, attorneys' fees and costs. *Id.* at 5a.

D. The Court of Appeals' Decision

The court of appeals affirmed. App., *infra*, 1a-26a. The court first held that the determination whether an illness constitutes a "serious health condition" under the FMLA is a mixed question of fact and law. *Id.* at 8a. The court then concluded as a matter of law that respondent's illness satisfied the Department of Labor regulatory criteria for a "serious health condition," *id.* at 8a-19a, although the court acknowledged that "[u]nder the [Department of Labor's regulatory] definition, it is pos-

sible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection." *Id.* at 16a. Despite this acknowledgement, the court rejected Gemini's argument that the regulations were inconsistent with congressional intent. *Id.* at 12a-16a.

In order to constitute a "serious health condition," the regulations require that, among other things, the employee's condition must result in an "incapacity requiring absence from work." 29 C.F.R. § 825.114(a)(2) (1993); *accord* 29 C.F.R. § 825.114(a)(2)(i) (1999) (current regulation imposing same requirement). Gemini submitted medical expert opinion evidence demonstrating that respondent had suffered only from "an upset stomach" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* App., *infra*, 19a. The court of appeals held that this evidence could not be considered, however, because in its view the FMLA *barred* Gemini from offering any after-acquired evidence to dispute respondent's claim that "her condition resulted in an 'incapacity requiring absence from work.'" App., *infra*, 17a. The court explained that the FMLA establishes an optional mechanism that permits employers to obtain one or more medical opinions to verify an employee's entitlement to FMLA leave. *Id.* at 18a. In the court's view, Gemini's failure to avail itself of this optional procedure precluded it from introducing after-acquired evidence to dispute the seriousness of the employee's health condition or the level of capacity of the employee during the relevant time period. *Id.* at 18a-19a.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Lower Federal And State Courts Are Divided Over The Question Whether Employers May Use After-Acquired Evidence To Defeat An Employee's FMLA Claim

Despite the optional nature of the FMLA's certification procedure, which provides that employers "may" require employees to provide appropriate certification of their entitlement to FMLA leave (29 U.S.C. § 2613(a) & (b)), the court below held that the FMLA's certification procedure is effectively mandatory, and that employers who fail to utilize that procedure are barred from disputing an employee's claim of entitlement to FMLA leave. According to the court of appeals, once respondent had proffered notes from her physician suggesting that she not work for a short period of time, "Gemini became *obligated* either to count [respondent's] absence as FMLA leave under the 'serious health condition' provision or to follow the [optional certification] procedures set out in the statute and the regulations . . . ." App., *infra*, 17a (emphasis added). The court of appeals held that Gemini's failure to invoke the optional medical certification process at the time of respondent's absence precluded Gemini from introducing any after-acquired evidence concerning the nature of respondent's illness at the time of her absence and its impact on her ability to work. *Id.* ("It may well be that Thorson's illness did not actually require that she be absent from work, but because the company did not resort to the protections for employers provided by the FMLA to address just this sort of situa-

tion, there is no genuine issue of fact on this part of the 'serious health condition' question.").[1]

The court of appeals' holding in this regard is consistent with the approach of a number of state appellate courts in FMLA cases. In *DeLong v. Trujillo*, 1 P.3d 195, 200 (Colo. Ct. App. 1999), *cert. granted* (May 30, 2000), for example, the Colorado Court of Appeals held that an employer's failure to notify an employee "that he had provided inadequate medical certification" barred the employer from "complain[ing] of the deficiency in the medical certification" in subsequent litigation with the employee. And in *Williams v. Rubicon, Inc.*, 754 So. 2d 1081, 1084-87 (La. Ct. App. 1999), *writ denied*, 752 So. 2d 864 (La. 2000), the court extended this principle even further, holding that the failure to abide by the medical certification procedure was itself a violation of the FMLA. The employer had terminated the employee after the employee was seen on television working as a volunteer during a leave of absence, but without first invoking the medical certification procedure. *Id.*

Thus, under the rule of law adopted by the court below and applied in these other cases, employees will be conclusively deemed to have suffered from a "serious

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[1] Similarly, in *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253 (N.D. Cal. 1998), the court precluded an employer from using after-acquired evidence to controvert an employee's FMLA claim. The employee had submitted an initial medical certification under the procedures of the FMLA, but the employer did not request a second medical opinion. The *Sims* court held that "an employer who denied an employee's request for leave without employing the second and third medical opinion procedures set out in section 2613 [of the Act], may [not] later challenge in a civil action under the Act the accuracy of the medical certification submitted by the employee in support of his request for medical leave." *Id.* at 1260.

health condition" even where, as here, the employer offers medical evidence sufficient to permit a finding that the employee did not in fact suffer from such a condition. The effect of this rule of law is to render the FMLA's optional medical certification procedure mandatory, because utilization of that procedure becomes the only available mechanism for contesting an employee's initial showing of possible entitlement to FMLA leave. Employers who fail to invoke the certification procedure are barred from challenging the employee's initial showing, and employers who do invoke the procedure are barred from challenging the outcome of that procedure. *See* 29 U.S.C. § 2613(d)(2) ("[t]he opinion of the third health care provider . . . shall be considered to be final and shall be binding"). Under either scenario, after-acquired evidence rebutting the employee's claim to have suffered from a serious health condition is rendered inadmissible by the rule of law adopted by the court below.

Other courts of appeals, by contrast, have adopted a contrary approach that does not compel employers to invoke the certification procedure in every case on pain of waiving the right to dispute the existence of a "serious health condition." In *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997), for example, the Sixth Circuit rejected the notion that an employer who does not invoke the optional medical certification procedure is barred from introducing after-acquired evidence of the employee's medical condition during subsequent FMLA litigation. The employee in *Bauer*, like respondent here, was terminated for excessive absenteeism under the terms of the employer's "no fault" attendance policy. *Id.* at 1110. The employee had provided only a hospital pre-admission slip and a prescription for medication to the employer, and the employer elected not to invoke the FMLA's medical certification process. *Id.* The employee sought to exclude after-acquired evidence demonstrating that he had not missed any work due to illness with a subsequent employer, and that he had not

sought medical treatment subsequent to his discharge. *Id.* at 1112. The Sixth Circuit expressly rejected the employee's assertion "that such after-acquired evidence should not be considered by the court," however, explaining that "the plaintiff has the burden to establish the objective existence of a serious health condition, and subsequent developments are relevant to such an objective inquiry." *Id.*

Similarly, in *Price v. City of Fort Wayne*, 117 F.3d 1022, 1027 (7th Cir. 1997), the court of appeals opened the door to the use of after-acquired evidence to dispute the existence of the employee's alleged "serious health condition." In *Price*, the employee had completed the employer's leave request form and attached a doctor's note at the time she requested leave. *Id.* at 1025. The court of appeals treated the employee's leave request form and doctor's note as an initial medical certification under the FMLA's optional dispute resolution procedure. *Id.* at 1026-27. Upon receipt of the leave request, the employer requested what the court characterized as a second opinion under the dispute resolution mechanism. *Id.* The court held that this request was invalid, however, because it impermissibly directed the employee to obtain the second opinion from an employer-associated doctor, in violation of the certification procedure's requirement that the medical professional providing the second opinion "*shall not be employed on a regular basis by the employer.*" *Id.* (citing 29 U.S.C. § 2613 (c)(2)).

Thus, the *Price* court was faced with a situation in which the employee had provided an initial medical certification, and the employer had not properly rebutted that certification pursuant to the optional dispute resolution mechanism of the FMLA. Under the rationale adopted by the court of appeals below, this would have been the end of the inquiry: The employer would have been precluded from introducing evidence to challenge the employee's assertion of a "serious health condition,"

and summary judgment on that issue would be appropriate. Instead, however, the *Price* court remanded to the district court for resolution of the "serious health condition" question, explaining that "disputed material questions of fact" regarding "[the employee's] medical condition require[d] further development to determine if she suffered from a 'serious health condition.'" 117 F.3d at 1027. Thus, the Seventh Circuit's holding in *Price* is irreconcilable with the rule of law adopted by the court of appeals in this case.[2] *See also Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3d Cir. 1997) (remanding for further proceedings to resolve factual question whether plaintiff suffered from "serious health condition" despite employer's evident failure to invoke the Act's certification procedure).

As these cases demonstrate, there is a widening division of authority among the lower state and federal courts over the first question presented in this case. This Court's review is necessary to resolve this conflict and provide a clear rule to guide federal and state courts considering the admissibility of after-acquired evidence in FMLA cases and the significance, if any, to be accorded an employer's failure to invoke or complete the optional certification process.

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[2] The *Price* court excluded from consideration the proffered medical opinion of the employer-associated doctor, but not because that opinion constituted after-acquired evidence. Rather, the court held the opinion was improper under the requirements of the medical certification procedure. 117 F.3d at 1026-27 (citing 29 U.S.C. § 2613(c)(2)). The court's remand order necessarily contemplated the use of after-acquired evidence to resolve the fact issues relating to the "serious health condition" question, despite the employer's failure to invoke the certification procedure in a valid manner. *See id.* at 1027.

II. The Decision Below Is Inconsistent With Decisions Of This Court

As noted above, the Act provides that the certification procedure "*may*" be invoked by employers (*see* 29 U.S.C. § 2613 (emphasis added)), but the effect of the rule of law adopted by the court of appeals is to transform the optional certification procedure into a mandatory and exclusive dispute resolution process that provides the sole mechanism for contesting a claimed "serious health condition." This interpretation of the Act is in direct conflict with the "common-sense principle of statutory construction" announced by this Court in *United States v. Rodgers*, 461 U.S. 677, 706 (1983), that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion." This rule of statutory interpretation has been repeatedly reaffirmed by this Court. *See, e.g., Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1336 (2000); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) ("The word 'may' clearly connotes discretion."); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (the word "'may' expressly recognizes substantial discretion"); *Levers v. Anderson*, 326 U.S. 219, 223-24 (1945) (holding that the word "may," as used in a Treasury regulation, did not mean "must").

To be sure, there are narrow and limited exceptions to this "common-sense principle of statutory construction." *Rodgers*, 461 U.S. at 706. The rule "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute[.]" *Id.* The rule can be defeated only in an extraordinary case, however. *See Thompson v. Roe*, 63 U.S. 422, 434 (1859) (rejecting argument that "may" should be read as "must," holding that "[i]t is only where it is necessary to give effect to the clear policy and intention of the Legislature, that such a liberty can be taken with the plain words of a statute"). Accordingly, an examination of legislative history and "atten-

tion to practical consequences" can aid the inquiry as to whether the extraordinary circumstances required to deviate from the general rule are present in any given case. *See, e.g., Cortez Byrd Chips*, 120 S. Ct. at 1336-39 (analyzing the "[s]tatutory history" and "practical consequences" and concluding that a permissive interpretation of the word "may" was required).

In this case, neither the legislative history nor a consideration of "practical consequences" suggests that the FMLA falls into the extraordinary category of a statute in which "may" means "must." Indeed, the legislative history is consistent with the view that invocation of the certification procedure is a discretionary option, rather than the sole mechanism for disputing an employee's FMLA claim. *See, e.g.*, S. REP. NO. 103-3, at 26 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 28 ("If an employee requests leave because of a serious health condition or to care for a family member with a serious health condition, an employer *may* require that the request be supported by a certification . . . .") (emphasis added); *id.* at 44 ("An employer *may* require medical certification . . . .") (emphasis added). The Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor, which has regulatory authority over the Act, has characterized these provisions in a similar fashion. FMLA Advisory Opinion No. 72, [1995-1999 Transfer Binder] Lab. L. Rep. (CCH) ¶32,417 (Sept. 20, 1995) ("FMLA's medical certification provisions *allow* an employer to request that leave for [a] serious health condition '. . . be supported by a certification issued by the health care provider . . .' of the employee or family member.") (emphasis added).

Significantly, moreover, this Court has held that the use of the words "may" and "shall" in the same statute compel the conclusion that Congress intended to provide options where it used "may," and to mandate action only where it used "shall." *See, e.g., Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*,

262 U.S. 649, 663 (1923) ("This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the Board and the reserve banks 'shall' do and what they 'may' do."); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory."). Section 2613 of the Act, of course, carefully distinguishes between the initiation of the certification procedure, which the employer "may" choose to invoke (29 U.S.C. § 2613(a)), and those obligations and consequences that Congress intended to be mandatory. *E.g.*, 29 U.S.C. § 2613(a) ("[t]he employee *shall* provide" certification upon request) (emphasis added); *id.* § 2613(d)(2) ("[t]he opinion of the third health care provider . . . *shall* be considered to be final") (emphasis added).

Thus, the court of appeals' decision conflicts with this Court's clear dictates concerning the significance to be accorded Congress' use of the term "may" in a federal statute. Moreover, the decision below also violates this Court's repeated admonition that "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citations omitted); *see, e.g., Jones v. United States*, 120 S. Ct. 1904, 1908-09 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals' interpretation of the FMLA raises serious constitutional questions under both Article III and the Seventh Amendment, because it effectively deprives employers of their right to have a key issue in FMLA damages actions—*i.e.*, whether an employee in fact suffered from a "serious health condition"—be presented to and resolved by the factfinder in an Article III court. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe*

Line Co., 458 U.S. 50 (1982). Accordingly, the decision below conflicts with this Court's precedents, and certiorari should be granted to resolve the conflict.

III. The Question Presented Is An Important And Recurring One, And Review Is Essential To Serve The Compelling Need For Uniform Interpretation Of The FMLA

The principal question presented in this petition, *i.e.*, whether an employer is precluded during litigation with a former employee from introducing after-acquired evidence concerning the existence of a "serious health condition," raises an important and recurring issue. Like the present case, many cases arising under the FMLA focus on whether an individual suffers from a "serious health condition." The extent, if any, to which employers can offer after-acquired evidence to rebut a plaintiff's initial showing is therefore of critical importance. Equally weighty is the closely intertwined question of the significance, if any, to be accorded an employer's failure to invoke the optional medical certification process, an issue that arises frequently in FMLA litigation in both state and federal courts. *See, e.g.*, *Sims*, *supra*; *DeLong*, *supra*; *Williams*, *supra*; *see also Marchisheck v. San Mateo County*, 199 F.3d 1068, 1077 (9th Cir. 1999) (discussing this issue without deciding it), *cert. denied*, 120 S. Ct. 2217 (2000). Only this Court can provide uniform guidance to the lower courts regarding these important questions.

The court of appeals' decision effectively defeats the optional nature of the certification process by forcing employers to choose between using the "optional" process or foregoing any future opportunity to dispute an employee's FMLA claim should the employee eventually file a lawsuit. That draconian and unjustifiable rewriting of a facially optional statutory procedure should be subjected to plenary review and scrutiny by this Court.

IV. The Court Of Appeals' Holding That Agency Rulemaking Is Not Constrained By Congressionally Established Limits Conflicts With This Court's Precedents

The court of appeals upheld the Department of Labor's regulatory definition of "serious health condition" despite the court's recognition that "[u]nder the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection." App., *infra*, 16a. In the court's view, the agency's decision to expand the coverage of the FMLA beyond the limits intended by Congress was "reasonab[e]" because the expanded scope of employer liability was "a legitimate trade-off" for the clarity of a bright-line rule that can be "uniformly" applied. *Id.*

Under the rule adopted by the court of appeals, therefore, agencies are given *carte blanche* to expand the scope of regulatory statutes beyond the limits envisioned by Congress, as long as the regulatory expansion can be justified on grounds of clarity or ease of application. That approach to judicial review of agency rulemaking is irreconcilable with numerous precedents of this Court, which make clear that the ultimate touchstone and absolute limit of regulatory authority is the intent of Congress.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for example, this Court held that when Congress has made its intent plain, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. That basic limitation on the rulemaking power of federal agencies is derived from the bedrock separation-of-powers principle that "All legislative powers ... granted [in the Constitution] shall be vested in a Congress of the United States," not in unelected Executive Branch officials. U.S. CONST. art. I, § 1. As this Court explained in *Ernst*

& Ernst v. Hochfelder, 425 U.S. 185 (1976), "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Id.* at 213-14 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936))). *Accord, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994).

This Court's precedents also foreclose the court of appeals' reliance on clarity and administrative convenience as permissible grounds for an agency's failure to abide by congressional intent. Indeed, precisely that issue was presented in *Sullivan v. Zebley*, 493 U.S. 521 (1990), which involved a challenge to the Secretary of Health and Human Services' regulatory definition of "disabled." In order to "'streamlin[e] the decision process'" regarding disability status and to "'provide a means to efficiently and equitably evaluate'" disability claims, the Secretary's regulation established rigid, bright-line rules for determining the disability status of children. *Id.* at 532-34 (citations omitted). The Secretary's bright-line rules, while administratively convenient, did not achieve the result envisioned by Congress in some instances. *Id.* at 528-36. The Court accordingly struck down the regulation as "'manifestly contrary to the statute'" (*id.* at 541 (citation omitted)), notwithstanding the Secretary's argument that use of the bright-line rules was "the only practicable way to" make the disability determinations at issue. *Id.* at 539.

In this case, as the court of appeals recognized below (App., *infra*, 16a), the Department of Labor's regulatory definition expands the scope of the phrase "serious health condition" beyond the limits intended by Congress, simply for reasons of convenience and ease of application. According to the court of appeals' reading

of the regulation, any health condition, no matter how minor, qualifies as a "serious health condition" as long as it results in more than three days of incapacity and more than one visit to a health care provider. *Id.* at 10a, 13a-17a. That conclusion is inconsistent with the statutory text, which requires that the health condition be "serious," not minor. 29 U.S.C. § 2612(a)(1)(C) & (D); *see* App., *infra*, 13a ("it may be that [respondent's] condition was not 'serious' in the usual sense of the word"). Moreover, the court of appeals' conclusion is also irreconcilable with the legislative history of the FMLA. Indeed, the final Senate Report on the Act squarely rejected the overly broad view of "serious health condition" that was adopted by the Department of Labor in its regulations and approved by the court below:

> The term "serious health condition" *is not intended to cover short-term conditions for which treatment and recovery are very brief*. . . . Conditions or medical procedures that would not normally be covered by the legislation include *minor illnesses which last only a few days* and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.

S. REP. NO. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30 (emphases added); *see also* H. REP. NO. 103-8(I), at 40 (1993) (same).

Similarly, the Senate Report provided a lengthy list of examples of the types of medical conditions that Congress expected to qualify as "serious health condition[s]," including "heart attacks, heart conditions requiring heart bypass o[r] valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job," and the like. S. REP. NO. 103-3, *supra*, at 29; *accord* H. REP. NO. 103-8(I),

supra, at 40. Needless to say, the mild upset stomach and diarrhea suffered by respondent are qualitatively different from the types of health conditions included in this list, and the court of appeals did not even question that proposition. Instead, the court blindly deferred to the regulatory definition despite its concession that the regulation could sweep within the coverage of the FMLA "some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions.'" App., *infra*, 16a. That extension of judicial deference to an agency's clear departure from congressional intent contravenes the principles announced by this Court in the cases cited above, and is therefore worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 30, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-1656/99-2059

KATHERINE A. THORSON, Appellee,

v.

GEMINI, INC., Appellant.

Equal Employment Advisory Council; Society for Human Resource Management; National Association of Manufacturers,

Amici on Behalf of Appellant,

Secretary of Labor,

Amicus on Behalf of Appellee.

No. 99-1708

KATHERINE A. THORSON, Appellee,

v.

GEMINI, INC., Appellant.

Equal Employment Advisory Council; Society for Human Resource Management; National Association of Manufacturers,

Amici on Behalf of Appellee,

Secretary of Labor,

Amicus on Behalf of Appellant.

Appeals from the United States District Court
for the Northern District of Iowa

Submitted: November 18, 1999
Filed: March 3, 2000

Before BOWMAN, LAY, and HANSEN, Circuit Judges

BOWMAN, Circuit Judge.

Gemini, Inc., appeals from the orders of the District Court granting judgment and awarding damages to Katherine A. Thorson[1] on her claim under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994) (FMLA or Act). Thorson cross appeals, challenging certain aspects of the damages award. We affirm.

I.

Thorson began working in the packing and shipping department of Gemini's plant in Decorah, Iowa, in September 1986. Acceptable absenteeism at Gemini was limited to five percent of an employee's scheduled work hours in a rolling twelve-month period. The limit cov-

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[1] Gemini states in its brief that Thorson indicated at trial a preference for the surname Rindels (she married and changed her name after suit was filed), and so Gemini used the name Rindels throughout its briefs to refer to the plaintiff (although Gemini's counsel called her "Ms. Thorson" at trial). Thorson's own brief, however, uses the name under which the case was filed (Thorson). The caption has not been changed in the District Court, to our knowledge, or in this Court. For the sake of consistency and to avoid any confusion, we will refer to the plaintiff as Thorson.

ered all absences (except those for scheduled vacation, holidays, or approved leaves of absence), regardless of cause and including absences for illness. Those employees with excessive absenteeism (greater than five percent) were subject to termination.

Thorson left work on Wednesday, February 2, 1994, complaining of diarrhea and stomach cramps and went to see a physician. She was absent from work on Thursday and Friday, and returned Monday, February 7, with a note from her doctor (presumably written at her February 2 visit) indicating "no work" until Monday, February 7. On Monday, she worked only a few hours before returning to the doctor with stomach pain. The doctor ordered tests for Friday, February 11, suspecting either a peptic ulcer or gallbladder disease. The test results were normal. Thorson returned to work on Monday, February 14, again with a doctor's note stating "no work" until February 14. Thorson worked that week but was terminated on February 18 for absenteeism exceeding five percent of her scheduled work hours during the previous twelve months. On March 9, another doctor determined that Thorson had a small hiatal hernia, mild antral gastritis that could be managed with antacid, and duodenitis, all stress-related.

In January 1995, Thorson filed a complaint in the District Court against Gemini alleging various violations of state and federal law, including a claim under the FMLA. Under the Act, an eligible employee is entitled to twelve weeks of unpaid leave during any twelve-month period for any of several reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D); *see id.* § 2611(2)(A) (defining eligible employee). The employee is entitled to be restored to her job (or to an equivalent position) upon her return to work after taking FMLA leave. *See id.* § 2614(a). Further, the employee's FMLA absences cannot count against her under

her employer's "no fault" attendance policy. *See* 29 C.F.R. § 825.220(c) (1999). Thorson claimed she was entitled to FMLA leave for her February 1994 absences, and therefore she should not have been terminated for excessive absenteeism.

The District Court granted summary judgment to Gemini on all counts of Thorson's complaint. As to her FMLA claim in particular, the court concluded that Thorson could not prove that the illness at issue was a "serious health condition," as she claimed. Thorson appealed, but only the adverse judgment on her FMLA claim. This Court reversed and remanded "to give the parties an additional chance to argue, and the district court another chance to determine, whether Thorson's condition meets the regulatory criteria for a serious health condition" in light of a Department of Labor (DOL) opinion letter that was released while Thorson's appeal was pending. *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141-42 (8th Cir. 1997).

Revisiting the issue with the benefit of the DOL opinion letter, the District Court[2] concluded that Thorson's illness in February 1994 was indeed a "serious health condition" within the meaning of the FMLA. *See Thorson v. Gemini, Inc.*, 998 F. Supp. 1034 (N.D. Iowa 1998). The court granted summary judgment to Thorson on the issue of liability and denied Gemini's motion for summary judgment. The case then proceeded to trial before Magistrate Judge Jarvey[3] on the

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[2] The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa.

[3] The Honorable John A. Jarvey, United States Magistrate Judge for the Northern District of Iowa, hearing the case with the consent of the parties pursuant to 28 U.S.C. § 636(c) (1994 & Supp. III 1997). The parties waived any right they may have had to a jury trial on the issue of damages.

issue of damages. The Magistrate Judge awarded Thorson $49,591.86 plus interest, costs, and attorney fees, but no liquidated damages. Gemini appeals and Thorson cross appeals.

II.

In its appeal, Gemini raises issues relating both to the question of FMLA liability and to the trial on damages. We address each in turn.

A.

Gemini contends that the District Court erred in granting summary judgment to Thorson on the question of FMLA liability because Thorson did not have a "serious health condition" within the meaning of the Act.[4] Our review of a district court's decision to grant summary judgment is de novo, and we apply the same standard as the district court. *See Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1147 (8th Cir. 1998). That is, we will affirm if, upon review, we agree that there are no genuine issues of material fact and that Thorson is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

We look first to the language of the statute as Congress enacted it for a definition of "serious health condition." As relevant here, the FMLA defines the phrase as "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." 29 U.S.C. § 2611(11)(B). It is undisputed that Thorson had an "illness" or a "physical

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[4] Because we are affirming the District Court on Gemini's claim that the court erred in granting summary judgment to Thorson on the question of FMLA liability, it is not necessary for us to address separately Gemini's argument that the court should have granted Gemini's motion for summary judgment.

. . . condition," so we focus our attention on what is required to prove "continuing treatment by a health care provider." To answer that question, we consult the regulations prescribed by the Secretary of Labor and the definition of "serious health condition" therein. *Id.* § 2654 (directing Secretary of Labor to "prescribe such regulations as are necessary to carry out" the Act). As we shall see, it was the DOL's decision that "serious health condition" should be defined by an objective test that could be applied consistently based on the facts of each case.

In June 1993, the Secretary first promulgated the interim final rule, effective August 5, 1993, also the effective date of the Act for most affected employers and employees. *See* The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 (1993) (interim final rule). The final rule appeared in the Federal Register on January 6, 1995, with an effective date of April 6, 1995.[5]

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[5] The interim final rule, The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,812 (1993), was codified at 29 C.F.R. pt. 825. The 1993 Code of Federal Regulations (CFR) (revised as of July 1, 1993) was the first CFR in which the interim final rule appeared. It is to this 1993 edition of the CFR that we refer when discussing that rule.

The final rule, the Family and Medical Leave Act of 1993, 60 Fed. Reg. 2237 (1995), replaced the interim rule at 29 C.F.R. pt. 825. As of July 1999, the final rule had not been amended since the 1995 promulgation, so when citing the final rule we refer to the most recent volume of the CFR available for Title 29, part 825, the 1999 edition (which in fact is the 1998 revision because none of the regulations that appear in the volume were amended between July 1998 and July 1999).

[Footnote continued on next page]

See 60 Fed. Reg. 2180 (1995) (final rule); *id.* at 16,382 (noting change in effective date and reporting corrections).

The interim final rule was the only official guidance available to Gemini (or to anyone else) at the time Thorson was terminated in February 1994. Thus, if we find the final rule in direct conflict with the interim rule, we do not see how we can give the later version of the rule retroactive effect when no retroactive intent has been expressed. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). On the other hand, the expanded final regulations, to the extent they merely amplify the language of the interim regulations, may provide valuable guidance to us as we apply the law to the facts here. In addition, the parties have directed our attention to the legislative history for congressional exposition on the FMLA and to DOL opinion letters for the agency's interpretation of its own regulations. It is axiomatic that neither of these resources provides controlling authority for our inquiry, but, again, they may provide helpful insight. We will explain the relative weight we give to these sources of possible clarification or explication as we consider each of them.

This is the definition of "serious health condition," as relevant to Thorson's claim, that appears in the interim final rule: "For purposes of FMLA, 'serious health condition' means an illness, injury, impairment, or

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We will append the dates of the CFR to our citations of the rules only when there might be some confusion as to which version we refer.

physical or mental condition that involves: . . . [a]ny period of incapacity requiring absence from work . . . of more than three calendar days, that also involves continuing treatment by . . . a health care provider." 29 C.F.R. § 825.114(a)(2); *see id.* § 825.800 (definitions). On its face, then, the interim final rule sets forth three objective requirements that must be met before Thorson can be deemed to have had a "serious health condition": she must have had a "period of incapacity requiring absence from work," that period must have exceeded three calendar days, and she must have had "continuing treatment by . . . a health care provider" within that period.

Before we proceed, we must clear up some confusion in this case about what are fact questions and what is to be decided by a court as a matter of law when determining whether an individual has a "serious health condition" within the meaning of the FMLA. Gemini takes seemingly inconsistent positions on this issue in its main appellant's brief. On the one hand, Gemini declares that the "district court erred in denying Gemini's motion for summary judgment because, **as a matter of law**, [Thorson's] condition was not protected by the statute." Brief of Appellant Gemini at 17 (emphasis added). On the other hand, citing *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190-91 (3d Cir. 1997), Gemini says, "It was **for the factfinder to decide** whether [Thorson's] condition is a serious health condition under the FMLA." Brief of Appellant Gemini at 36 (emphasis added).

Having considered the issue, we conclude that this is one of those ubiquitous mixed questions of fact and law. As we noted above, the regulations implementing the FMLA (as relevant here) set out an objective test for a FMLA "serious health condition." It is for the fact-finder to look at the record and decide if the evidence supports the elements of that test. Once the fact-finder has affirmatively found the necessary facts, the conclusion that a plaintiff had a "serious health condition" is

inescapable as a matter of law. Therefore, if there are no genuine issues raised as to those facts, which are all material, then summary judgment on the question of "serious health condition" will likely be appropriate (at least if determining whether the plaintiff had a "serious health condition" will conclusively determine liability, as in this case). With this framework in mind, we consider the factors comprising the objective test and the evidence in the record of this case to determine if the District Court was correct in granting summary judgment to Thorson. We forgo our discussion of incapacity for the time being and consider first whether Thorson underwent the "continuing treatment" required for a "serious health condition." We also note that it is without dispute that Thorson's absence for her February 1994 illness exceeded three calendar days, so we will not belabor that part of the test.

"Continuing treatment," as relevant here, means that "[t]he employee . . . is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider . . . ." 29 C.F.R. § 825.114(b)(l); *see id.* § 825.800 (definitions). Under this definition, and given the undisputed evidence in this case, it is clear that Thorson's illness of February 1994 met the "continuing treatment" part of the definition of "serious health condition" under the FMLA interim final rule: she saw a physician on February 2 and February 7, and had tests performed on February 11, all while she was absent from work due to illness.

The final regulations expound upon and rearrange some of the language that appeared in the interim regulations, but they do not change the substance of the rule. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 162 n.6 (lst Cir. 1998) (noting agreement with Third Circuit's conclusion in *Victorelli* that standard for FMLA "continuing treatment" is "essentially the same" in both sets of regulations). In the final regulations, "serious health condition," as relevant to Thorson's case:

> means an illness, injury, impairment, or physical . . . condition that involves:
>
> . . .
>
> (2) *Continuing treatment* by a health care provider. A serious condition involving continuing treatment by a health care provider includes . . :
>
> (i) A period of *incapacity (i.e.,* inability to work . . . due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (A) Treatment two or more times by a health care provider . . . .

29 C.F.R. § 825.114(a)(2)(i)(A); *see id.* § 825.800 (definitions).[6] "Treatment . . . includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition." 29 C.F.R. § 825.114(b); *see id.* § 825.800 (definitions). Reserving for the moment, as we have said, the question of Thorson's "incapacity" (which has become a part of the "continuing treatment" test in the final rule), Thorson otherwise had the requisite "continuing treatment" during her February illness under the objective standard set forth in both rules. This is essentially without dispute. Gemini nevertheless argues that, given the ultimate di-

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[6] The only difference between the interim and the final regulations that arguably is of substance is the requirement that the statutory absence from work exceed three **consecutive** days. Again, there is no dispute that this was the case for Thorson in February 1994.

agnosis of only minor ailments, Thorson did not have a FMLA-qualifying "serious health condition" -regardless of whether the illness met the objective criteria set forth in the regulations.

As Gemini notes, the final rule expands upon the interim final rule with this statement: "Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, . . . *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." 29 C.F.R. § 825.114(c); *see id.* § 825.800 (definitions). Gemini would have us declare that Thorson's illness was not a "serious health condition" because an upset stomach and a minor ulcer – the final diagnosis of the February 1994 illness – are on the list of conditions that, at least ordinarily, "do not meet the definition . . . and do not qualify for FMLA leave."

On April 7, 1995, the DOL issued an opinion letter that iterated the above-quoted language from § 825.114(c) of the final rule and concluded:

> The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).

Op. FMLA-57 (Apr. 7, 1995).[7] But then, in an opinion letter dated over a year and a half later, the DOL re-

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[7] The letter refers to an alternate definition of "continuing treatment" found in the regulations, besides the one sup-

[Footnote continued on next page]

ferred to this sentence from the 1995 letter and said, "This statement is an incorrect construction of the regulations and must, therefore, be withdrawn." Op. FMLA-86 (Dec. 12, 1996). According to the DOL, "[c]omplications, per se, need not be present for a condition to qualify as a serious health condition if the regulatory . . . period of incapacity and 'regimen of continuing treatment by a health care provider' tests are otherwise met." *Id.* The letter goes on to emphasize the objective nature of the test: "The regulations reflect the view that, **ordinarily**, conditions like the common cold and flu (*etc.*) would not routinely be expected to meet the regulatory tests, *not* that such conditions could not qualify under FMLA where the tests are, in fact, met in particular cases." *Id.*

Thorson insists that we must apply the 1996 letter to her case. Indeed, we remanded to the District Court the first time this case was on appeal for further argument in light of that letter, which was issued while the appeal was pending. And generally we do defer to the opinions of the agency charged with promulgating rules for and enforcing congressional enactments. "Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504,

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ported by the facts of this case, that requires a prescribed regimen of ongoing treatment instead of treatment two or more times by a health care provider. *See* 29 C.F.R. § 825.114(b)(2) (1993). We will assume, as has everyone else who is on the record in this case, that the letter refers not only to the "regimen of continuing treatment" part of the regulatory test but also to the "treatment two or more times by a health care provider" part of the test.

512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410,414(1945))). Nevertheless, we are far less inclined to yield to agency opinion if the administrative agency's interpretation of a matter appears to be inconsistent, as in this case (to say nothing of the issues that would arise should we decide to regard either a 1995 opinion letter or a 1996 opinion letter as determinative of liability for an alleged 1994 violation, if such letter were in conflict with the plain language of the regulations that were in effect at the time of the purported violation). *See id.* at 515.

But even without deferring to the DOL's opinions (either one of them), we conclude that Thorson received "continuing treatment" under the objective standard set forth in the regulations, and thus her illness satisfied this part of the "serious health condition" test. Subjectively, it may be that Thorson's condition was not "serious" in the usual sense of the word. Nevertheless, until February 11, her physician believed Thorson could have a potentially serious condition, and it was not until March 9, after Thorson had been terminated from her job at Gemini, that a diagnosis definitively ruled out her physician's initial suspicions. Thorson was sufficiently ill to see a physician two times in a period of just a few days and that is all that the plain language of both the interim and final rules requires for "continuing treatment."

Gemini then broadens its argument to attack the regulations themselves, asserting that they are inconsistent with congressional intent. If "Congress has directly spoken to the precise question at issue," then we will not defer to the agency's interpretation to the extent that it is inconsistent with the "unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842, 843 (1984). On the other hand, "if the statute is silent or ambiguous," then the agency's construction of the legislation is entitled to deference, providing it "is based on a permis-

sible construction of the statute." *Id.* at 843. Gemini contends that Congress has "spoken directly" to the issue of a FMLA "serious health condition," citing this statement from the Senate Report on the bill:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days . . . .

S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30. The Report continues with a non-exclusive list of "serious health conditions," such as heart attack, cancer, stroke, appendicitis, pneumonia, heart bypass surgery, back surgery, and pregnancy. The type of gastrointestinal distress that Thorson ultimately was determined to have is not among the examples given. On the other hand, the Senate Report noted that "[t]he definition of 'serious health condition' . . . is broad and intended to cover various types of physical and mental conditions." *Id.*

We do not believe this legislative history assists Gemini all that much. While Congress may have "expected" that minor illnesses "normally" would not come within the definition of "serious health condition," that does not mean such ailments can never be FMLA "serious health conditions." Further, a non-exclusive list of ailments that might qualify as "serious health conditions" that does not include Thorson's final diagnosis

does not preclude FMLA leave for her absence.[8] She missed work for more than a "few days" on the advice of a doctor. Thorson's treating physician originally thought she might have a peptic ulcer or gallbladder disease, conditions that could have been quite serious in any sense of the word.

But even if we thought the legislative history would be helpful to Gemini's position, we would reject the contention that it should prevent us from deferring to the DOL's interpretation of the statute as expressed in the regulations. Despite Gemini's argument to the contrary, we do not see this legislative history as Congress speaking "directly" to the question of what constitutes a "serious health condition." The Act's definition of "serious health condition," which is without question Congress speaking "directly" to the issue, is broad and does not include any examples of conditions that either do or do not qualify as FMLA "serious health conditions." *See supra*, at 5-6 (quoting statutory definition of "serious health condition"). There is no express statutory language that parallels the legislative history Gemini cites.

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[8] Incidentally, this was a list that the DOL considered making part of the final rule. In reporting the final rule, the DOL stated:

> The Department did not consider it appropriate to include in the regulation the "laundry list" of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions in the list or to second-guess whether a condition is equally "serious", rather than apply the regulatory standard.

60 Fed. Reg. 2180, 2195 (1995)

In any case, the DOL's objective test for "serious health condition," which avoids the need for employers – and ultimately courts – to make subjective decisions about statutory "serious health conditions," clearly is a permissible construction of the statute. *See Chevron*, 467 U.S. at 843. Under the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as "serious health conditions" may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate tradeoff for having a definition of "serious health condition" that sets out an objective test that all employers can apply uniformly. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 699(1991) ("Having determined that the Secretary's position is entitled to deference, we must decide whether this position is reasonable."). It is true that honest (or less than honest) errors by health care providers and fraud or abuse by employees are potential problems, given the objective nature of the test. Yet, as we discuss in the next part of this opinion, in further defining "serious health condition" to require an "incapacity requiring absence from work," Congress and the DOL have devised protections for the employers that choose to use them. *See* 29 C.F.R. § 825.114(d) (1993) ("The scope of 'serious health condition' is further clarified by the requirements of the Act that the health care provider may be required to certify . . . that 'the employee is unable to perform the functions of the position of the employee.'").

Under the regulatory test promulgated by the DOL in the interim final rule, as interpreted in light of the final rule and relevant DOL opinions, there are no genuine fact issues on the question of whether Thorson received "continuing treatment" under the FMLA for her February 1994 illness. Thus, she met this part of the test for a "serious health condition."

B.

Gemini contends that, even if Thorson met the "continuing treatment" part of the definition of "serious health condition," she has not shown that her condition resulted in an "incapacity requiring absence from work." 29 C.F.R. § 825.114(a)(2) (1993). It may well be that Thorson's illness did not actually require that she be absent from work, but because the company did not resort to the protections for employers provided by the FMLA to address just this sort of situation, there is no genuine issue of fact on this part of the "serious health condition" question.

An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work. *See id.* § 825.302(c) (1993). "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir.), *cert. denied*, 120 S. Ct. 588 (1999). Thorson was absent for more than three days with notes from her physician, written on two different occasions within that period of absence, indicating that she was not to work. At that point, Gemini became obligated either to count Thorson's absence as FMLA leave under the "serious health condition" provision or to follow the procedures set out in the statute and the regulations designed to prevent employee abuse of the Act. *Cf. Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1046 n.6 (8th Cir. 1999) (concluding that employee's notice obligations under the FMLA were not met where employee's written medical excuses "were only given after the fact in response to disciplinary proceedings, not 'as soon as practicable' after the missed work"). That is, Gemini could have initiated the FMLA's certification process before summarily terminating Thorson. *See* 29 U.S.C. § 2613; 29 C.F.R. § 825.305(1993). Had it done so, it may have

been able to determine that Thorson did not have a "serious health condition" within the meaning of the FMLA.

Under the regulations,[9] an employer is permitted to require an employee who might be qualified to receive FMLA leave to provide a certification issued by the employee's health care provider, detailing such information as the diagnosis and the date and duration of the condition. *See* 29 C.F.R. § 825.306(a) (1993). The "certification must also include either a statement that the employee is unable to perform work of any kind, or a statement that the employee is unable to perform the essential functions of the employee's position." *Id.* § 825.306(b). To prevent abuse of FMLA leave, the employer may require a second opinion from a health care provider of the employer's choice and at the employer's expense. *Id.* § 825.307(a). In the event the first two opinions conflict, a third, binding opinion may be obtained from a health care provider agreed to by both parties, again paid for by the employer. *Id.* § 825.307(c). The responsibility to request FMLA certification is the employer's. Gemini never sought such certification, notwithstanding that Thorson had timely presented her employer with two notes from her physician indicating, without further explanation, that she was not to work until certain dates.

We agree with the District Court that, in these circumstances, Gemini cannot show that there is a genuine issue of fact regarding Thorson's incapacity during the February absences, although it may have been able to do so (or even to prevail on this issue) had it availed itself of the protections provided for within the FMLA. As it

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[9] In the circumstances of this case, any differences between the interim and final regulations in the areas of notice and certification are not significant.

was, in defending against Thorson's motion for summary judgment, Gemini had to rely upon a physician's evaluation of Thorson performed many months after the termination and for purposes of this litigation, which stated that there was no obvious reason Thorson should have missed work in February 1994, and upon a psychologist's opinion, based on an evaluation made two years after Thorson's termination, that Thorson's physical problems were manifestations of a psychological problem. In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini cannot show, with its evaluations made long after the fact, that there remains a genuine issue of material fact on the question of Thorson's capacity to perform her job.

Given the sum of our conclusions regarding the three-part definition of "serious health condition" under the FMLA, as that definition applies to the undisputed facts of this case, we conclude that the District Court was correct in granting Thorson summary judgment on the issue of FMLA liability.

C.

For its next point on appeal, Gemini contends that the Magistrate Judge erred in excluding the testimony and report of Gemini's expert Dr. Jane Cerhan, a neuropsychologist, on the question of damages. The court granted Thorson's motion in limine and excluded the evidence. We review the decision to exclude evidence for a clear and prejudicial abuse of the trial court's discretion. *See Allen v. Entergy Corp.*, 193 F.3d 1010, 1015 (8th Cir. 1999).

"Gemini's position was that [Thorson's] mental condition made her unemployable, and thus evidence of her condition should have been considered when determining damages." Brief of Appellant Gemini at 37. Dr. Cerhan's testimony and report, presented to the Magistrate Judge in an offer of proof, made it clear that she

believed Thorson to have a problem with somatization. That is, Dr. Cerhan thought that, over the years, Thorson's mental states (e.g., depression, stress) had been converted into physical symptoms (e.g., stomach pain and other ailments). The court granted Thorson's motion in limine because Gemini had designated the expert to testify about Thorson's alleged emotional or mental suffering, not about her alleged unemployability as a limitation on damages. *See* Trial Transcript at 274. The Magistrate Judge also indicated that he had read the report and noted the emphasis the report placed on the lack of emotional harm suffered by Thorson as a result of losing the job at Gemini. *See id.* Although the Magistrate Judge did not explicitly say as much, it appears Dr. Cerhan's testimony and report were excluded under Federal Rule of Civil Procedure 26(a)(2)(B) because she was not designated as an expert on the question of damages and because the pretrial report prepared by Dr. Cerhan did not "contain a complete statement of all opinions to be expressed." The court said, "I do see references to somatization on the last page of her report, but the references in the report are references to the reasons why she did not believe that the Plaintiff has suffered emotional harm." Trial Transcript at 274. Moreover, there was a question of relevance. The issue of emotional harm to Thorson, or the lack thereof, related to a non-FMLA claim and was out of the case long before the trial on damages.

Further, even if the evidence should have been allowed, the exclusion of Dr. Cerhan's testimony and report was not prejudicial to Gemini. We note, as did the Magistrate Judge, that Dr. Cerhan did not suggest the conclusion for which Gemini claims it wanted the evidence admitted. In neither her report nor her proffered testimony did Dr. Cerhan conclude, or even imply, that Thorson's "mental condition made her unemployable." Brief of Appellant Gemini at 37. Dr. Cerhan merely stated that a somatization problem might well result in attendance issues at work. Thorson's history of exces-

sive absenteeism before, during, and after her employment with Gemini was fully a part of the record, and the Magistrate Judge duly noted Thorson's attendance problems at Gemini and at later places of employment. *See* Order of Feb. 2, 1999, at 4-5. In these circumstances, we cannot say that the court "exclude[d] evidence of a critical nature, so that there is no reasonable assurance that the [fact-finder] would have reached the same conclusion had the evidence been admitted," *First Sec. Bank v. Union Pac. R.R.*, 152 F.3d 877, 879(8th Cir. 1998) (quoting *Adams v. Fuqua Indus. Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)) (alterations ours), especially where, as here, the court has assumed the role of fact-finder in a bench trial.

We hold that the Magistrate Judge did not abuse his discretion to the prejudice of Gemini in excluding Dr. Cerhan's testimony and report from the trial on damages.

D.

Gemini's final issue on appeal, that Thorson should not collect costs and attorney fees upon a reversal on the question of liability, is obviously of no force in the face of our affirmance of the District Court's decision to grant summary judgment to Thorson on the issue of FMLA liability.

III.

We turn now to the issues raised by Thorson in her cross-appeal, all of which relate to the Magistrate Judge's award of damages.

A.

Thorson first claims she was entitled to an award of liquidated damages. Under the FMLA, the defendant employer "shall be liable to any eligible employee affected [by a violation of the Act] . . . [for] an additional amount as liquidated damages equal to the sum of the amount" of other damages and interest awarded pursuant

to § 2617(a)(l)(A)(i) and (ii) of the Act. 29 U.S.C. § 2617(a)(l)(A)(iii). But there is an exception to this otherwise mandatory call for liquidated damages. If the employer can "prove[] to the satisfaction of the court that the" FMLA violation "was in good faith and that the employer had reasonable grounds for believing" that its behavior was not in violation of the FMLA, then the court in its discretion may decline the award of liquidated damages. *Id.* The court here found the necessary good faith, and opted in its discretion to deny Thorson liquidated damages. We review for an abuse of that discretion.

The Magistrate Judge concluded that Gemini acted in good faith in believing that firing Thorson was not a violation of the FMLA. As the court pointed out, the law was relatively new and had been in effect for just over six months when Gemini terminated Thorson's employment. The owner and president of Gemini (who was the final arbiter of the decision to fire Thorson) was aware of the new law and had made efforts to get a copy of the interim regulations so as to include information about the FMLA in the March 1994 revision of Gemini's employee manual. It is true that Gemini neglected to ask Thorson for certification of her "serious health condition," and that omission has proved to be a problem for Gemini on the question of FMLA liability. But it does not demonstrate that Gemini acted in bad faith in terminating an employee who had a history of excessive and disruptive absences. Moreover, when the District Court looked at the facts of this case the first time, without the benefit of the DOL's 1996 opinion letter, it granted summary judgment for Gemini on Thorson's claim. We agree that the District Court's first decision on liability is compelling evidence of Gemini's objectively reasonable belief, to the extent such belief may be relevant, that it was not violating the FMLA when it terminated Thorson. The Magistrate Judge did not clearly err in finding that Gemini has met its burden of proving that those who had responsibility for Thorson's

termination acted in good faith and with reasonable grounds to believe they were not violating the FMLA when they terminated Thorson. Therefore the court did not abuse its discretion in declining to award liquidated damages to Thorson.

B.

Thorson contends that the Magistrate Judge erred because he did not include in the backpay award any amount for lost overtime wages. Thorson had worked an average of sixty-five hours of overtime in 1992 and 1993, and argues that the court should have included overtime pay for sixty-five hours per year in the award of backpay. For its part, Gemini asserts that any award of overtime backpay should be reduced by the value of the hours of work lost as a result of Thorson's absenteeism.

Thorson's contention that she would have worked overtime in each of the four-plus years between February 1994 and the time of the trial on damages in August 1998, had she remained at Gemini, is speculative, and the number of any such overtime hours is even more so. We see no error in the court's failure to award an amount for overtime backpay that would be little more than guesswork.

C.

The focus of Thorson's challenge to the amount of frontpay awarded is a job she had with Northern Engraving in Spring Grove, Minnesota, beginning in January 1997. She worked at Northern for fourteen months and then quit because six months earlier she and her husband had moved to another town, increasing the length of her commute to Northern. She also testified that she did not like the night shift or the amount of overtime she was expected to work, and that she had found other employment. As the court noted, however, she soon left that other employment, claiming that it bothered her back, but did not reapply to Northern. The Magistrate Judge

found that Thorson's pay rate at Northern was increasing much faster than it had been at Gemini. The court decided that, within one year from the trial on damages, Thorson would have been making the same wage at Northern, had she stayed, as she was making when she left Gemini, with similar benefits. The Magistrate Judge awarded Thorson an hourly wage differential of $0.96 for one year of straight time (no overtime) as frontpay. Thorson challenges the amount on several grounds. Because frontpay is an equitable remedy, we review the court's decisions regarding such a remedy for an abuse of discretion. *See Smith v. World Ins. Co.*, 38 F.3d 1456, 1466 (8th Cir. 1994) (ADEA case); *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 322 (8th Cir. 1993) (§1983 case).

Thorson insists that, as a part of the frontpay award, she is entitled to one year's overtime pay and one year's profit sharing, calculated for the year that would begin upon the end of the trial on damages. We think the overtime frontpay claim is even more speculative than the claim for overtime backpay. As for the claim for profit sharing, Thorson seeks $2114.23, an amount evidently based on the profit-sharing information available at the time of trial, or soon after, for Gemini's then most recent fiscal year (1997-98). The court awarded Thorson $8318.75 in lost profit-sharing benefits, in a category separate from either backpay or frontpay. We will assume this was for the backpay period alone (the court did not include its calculations in its order), and that no amount was included for profit-sharing "frontpay." In any event, as with the overtime issues, we conclude that the court did not abuse its discretion because it chose neither to predict that, for the year following the trial on damages, Gemini would be profitable and would continue to share profits with its employees, nor to divine the amount of profit sharing that might have been due Thorson had she still been employed at Gemini.

Thorson further claims that the pay differential for the award of frontpay should be $2.12 per hour based on the pay she received at the last job she had before trial, a one-week job she acquired through a temporary agency, and that she should receive frontpay for twelve years, until she reaches age sixty-two, instead of for one year. We disagree. The court was fully justified in choosing a pay differential based on Thorson's job at Northern Engraving: it was a factory job like the one she had at Gemini, it was the job she held the longest between February 1994 and trial, and she left it voluntarily. Further, the Magistrate Judge's finding that Thorson's salary at Northern would have matched her predicted salary at Gemini within one year is not clearly erroneous. Thus the court's decision to award one year of frontpay at a rate of $0.96 per hour, based on factual findings that are not clearly erroneous, was not an abuse of the court's discretion.

D.

Finally, Thorson challenges the Magistrate Judge's decision to reduce her damages for failure to mitigate. Again, we discern no clear error in the court's calculations. *See Kehoe v. Anheuser-Busch Inc.*, 96 F.3d 1095, 1106 (8th Cir. 1996) (reviewing mitigation finding for clear error in ADEA case). The court reduced the award not only by the amounts she actually earned (or, in the case of unemployment compensation, collected) during the backpay period, but also because of decisions she twice made to quit employment voluntarily, when the working conditions of those positions were not unreasonable.[10] Given Thorson's post-Gemini work history

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[10] Thorson quit a number of jobs in the period between leaving Gemini and the trial, but the Magistrate Judge reduced the backpay award for failure to mitigate on only two of the voluntary terminations. Evidently, the court found

[Footnote continued on next page]

(and her surprising inability to find entry-level work even in the booming economy until her unemployment insurance expired, twice), it could be argued that the Magistrate Judge was generous in not reducing the backpay award further for Thorson's failure to mitigate. In any case, we see no error in the court's decision on mitigation.

IV.

The judgment and orders of the District Court and the Magistrate Judge are affirmed in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Footnote continued from previous page]
persuasive Thorson's intimations that the working conditions were unreasonable at the other jobs she quit (e.g., she did not feel she had the proper training for home health care of a young patient; inspecting raw eggs made her feel nauseated; she did not like handling cash at a convenience store at night, especially when she heard of the murder of a convenience store clerk not far away).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

KATHERINE A. THORSON,	)	
	)	
Plaintiff,	)	No. C 95-2009 MJM
	)	
vs.	)	
	)	
GEMINI, INC.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

Katherine Thorson sued her former employer Gemini, Inc., claiming that her termination from Gemini violated the Family and Medical Leave Act.[1] After finding that Thorson's termination did not violate the FMLA because her illness did not appear to meet the regulatory criteria for a "serious health condition," as defined by 29 C.F.R. § 825.114, this Court granted summary judgment to Gemini.

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[1] Thorson's original Complaint alleged gender discrimination, an ADA claim, and a retaliatory discharge claim, but Thorson only appealed the decision to grant summary judgment for the FMLA claim. Accordingly, the only issue before the Eighth Circuit on appeal--and before this Court on remand--is the FMLA claim.

The plaintiff then appealed this Court's summary judgment regarding the FMLA claim. After the appellate briefs were filed with the Eighth Circuit Court of Appeals, the Department of Labor issued an opinion letter discussing what constitutes a "serious illness" under section 825.114. In light of this opinion letter,[2] the Eighth Circuit believed it would be "prudent to give the parties an additional chance to argue, and the district court another chance to determine, whether Thorson's condition meets the regulatory criteria for a serious health condition." *Thorson v. Gemini*, 123 F.3d. 1140, 1141 (8th Cir. 1997). The Eighth Circuit thus remanded the case to this Court for further proceedings as this Court deemed necessary.

On remand, both the plaintiff and the defendant filed motions for summary judgment and the Secretary of Labor filed a brief as amicus curiae. This Court heard oral argument on these motions and at the conclusion of the oral argument, denied the defendant's motion for summary judgment but reserved ruling on the plaintiffs motion. The Court must therefore decide whether to grant summary judgment to the plaintiff on the issue of liability.

Discussion

The Eighth Circuit succinctly summarized the events preceding Thorson's termination as follows:

> The events leading up to Thorson's termination began on February 3,1994, when she left work early and went to the Howard County Hospital because she was ex-

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[2] The opinion letter reversed an earlier Department of Labor opinion letter, Opinion FMLA-57, Wage and Hour Manual (BNA), 00:3055 (Apr. 7, 1995), which Gemini cited in its appellate brief.

> periencing stomach problems. Dr. John LaCelle examined Thorson, and believed that she was suffering from acute gastritis and possibly a peptic ulcer. He ordered her not to return to work until February 7 and treated her with ulcer medication (Axid) and antacids. On February 7, Thorson returned to work but again felt ill and returned to Dr. LaCelle. At the conclusion of this examination, Dr. LaCelle still believed that Thorson may have been suffering from a peptic ulcer or possibly gall bladder disease, and he scheduled Thorson for an upper gastrointestinal test and a gall bladder test on February 11. Dr. LaCelle ordered Thorson not to return to work until February 14. The tests Thorson underwent on February 11 came back normal, and Thorson returned to work on February 14. Thorson worked until February 18, at which time she was fired for excessive absenteeism. On March 9, 1994, after undergoing an upper gastrointestinal endoscopy. Dr. Joan Kepros concluded that Thorson was suffering from a small hiatal hernia and mild antral gastristis and duodenitis.

123 F.3d at 1140-41.

Although Thorson did indeed miss work because of her illness, the Family Medical Leave Act (FMLA) would allow Thorson to take up to a total of 12 workweeks of leave per year if she has a "serious health condition" that renders her unable to perform the functions of her job. 29 U.S.C. § 2612(a)(1)(D) (1994); *see also Thorson*, 123 F.3d at 1141. The Department of Labor's regulations implementing the FMLA forbid an employer from counting FMLA leave time under "no-fault" attendance policies. 29 C.F.R. § 825.220(c); *Thorson*, 123

F.3d at 1141. Because Gemini considered Thorson's absences to be unexcused and thus outside the umbrella of the FMLA,[3] this Court must decide whether Thorson's illness qualified as a "serious health condition" so as to excuse her absences under the FMLA.

The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." 29 U.S.C. § 2611(11)(B). The Department of Labor's regulations further explain that continuing treatment by a health care provider includes a period of incapacity (i.e., inability to work) of more than three consecutive calendar days and treatment by a health care provider on two or more occasions. 29 C.F.R. § 825.114(a)(2)(i); *Thorson*, 123 F.3d at 1141.

In addition to these regulatory criteria, other provisions state that:

> Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

29 C.F.R. § 825.114(c). In an opinion letter the Department of Labor issued after this Court granted summary judgment to Gemini, the Department of Labor further explained the following:

> Ordinarily, we anticipate that these health conditions would not meet the definition in

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[3] Thorson was terminated because of her absences from work, and the most recent absences prior to her termination were linked to the illness and resulting medical excuse at issue in this lawsuit.

> 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in these regulations. If, however, any of these conditions met the regularly criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA . . . .

Opinion FMLA-86, Wage and Hour Manual (BNA), 99:3091, 99:3091-92 (Dec. 12, 1996).

In its previous opinion granting summary judgment to Gemini, this Court found that Thorson's illness was best described as an upset stomach and a minor ulcer. Because such conditions are explicitly listed as conditions that ordinarily do not meet the definition of a "serious health condition," this Court concluded that her conditions could not qualify as a "serious health condition"--even if they otherwise met the continuing treatment by a health care provider" prong in 29 C.F.R. § 825.1 14(a)(2). Now that the Department of Labor has clarified that medical conditions which do not usually qualify as "serious" could still be protected by the FMLA if they constitute "an incapacity of more than three consecutive calendar days that also involves qualifying treatment," this Court must reevaluate whether Thorson's situation meets those criteria.

Whether Thorson had a "Serious Health Condition"

The Court begins its analysis by focusing on whether Thorson's condition constituted an "incapacity of more than three consecutive calendar days that also involves qualifying treatment." *See* Opinion FMLA-86, Wage and Hour Manual (BNA), 99:3091, 99:3091-92 (Dec. 12,1996). The Court will first examine how many consecutive days Thorson was absent. After Thorson

left work on Thursday, February 3,1994, she received doctor's orders not to return to work until Monday, February 7, 1994. She was thus absent from work for part of the day on Thursday, February 3, and all day Friday, February 4. When she came back to work on Monday, February 7, she still felt ill, so she left work again and returned to her doctor. After an examination, her doctor scheduled further tests and ordered her not to return to work until the following Monday, February 14. Thus after leaving work on Monday, February 7, Thorson missed work from Tuesday, February 8, through Friday, February 11. During those absences she underwent further testing, and on Friday, February 11, her tests results came back normal. She finally returned to work on Monday, February 14, and worked until she was fired for excessive absenteeism on Friday, February 18. *See Thorson*, 123 F.2d at 1140-41. Reviewing these facts, the Court finds that Thorson missed at least four consecutive calendar days during the week of February 7, 1994.

The Court next examines whether the treatment that Thorson received during those absences constituted "qualifying medical treatment." To this end, the evidence shows that a medical doctor examined her at least twice during the relevant time period, that the doctor prescribed medication and ordered her not to return to work, and that she underwent further testing. The Court finds that these facts constitute the kind of "qualifying medical treatment" anticipated by the regulations, because "treatment" by a health care provider includes not only actual diagnoses, but also examinations to determine if a serious condition exists. *See* 29 C.F.R. 825.114(b); *see also* Brief of the Secretary of Labor as Amicus Curiae, Doc. #67, at 10. As the Secretary of Labor explained in her Amicus Curiae brief,

> It is simply unreasonable to require employers and employees to determine, at the time the absence is requested, whether a

> particular condition is or may be diagnosed to be sufficiently "serious" to invoke FMLA coverage. . . . Congress could hardly have intended to place employees at risk of losing their jobs if they must miss work for medical testing. Where an employee is absent from work for more than three consecutive days, pursuant to a doctor's orders, to allow for testing to determine the precise nature of the condition, FMLA coverage for that leave should not depend on the nature of the ultimate diagnosis.

Doc. #67, at 11. Here, Thorson was absent from work for at least four consecutive days, pursuant to doctor's orders. During her absence, she saw a doctor at least twice, was prescribed medication, and underwent further testing. Based on these facts, Thorson's situation constituted a "serious medical condition" for purposes of the FMLA, even though her diagnosis did not ultimately turn out to be a condition that is typically considered to be "serious.[4]

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[4] Because Thorson has a "serious health condition" under both the interim final regulations and under the final regulations, this Court need not resolve whether the interim final regulations solely govern this case, or whether the final regulations may be viewed for guidance in how to interpret the interim final rules.

The Secretary of Labor argues that the interim final regulations should govern this case because Thorson's absences and termination occurred in February of 1994, which was before the date of the final regulations. *See* Doc. #67, *citing Victorelli v. Shadyside Hospital*, No. 96-3597 (3rd Cir., November 3, 1997); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 n.1 (7th Cir. 1997); and *Manual v. Westlake Polymers Corp.*, 66 F.3d at 758, 761 n.2 (5th Cir. 1995). Be-

[Footnote continued on next page]

Having found that Thorson had a "serious medical condition," the Court next examines whether Thorson was unable to work because of her illness.[5]

Whether Thorson Was Unable to Work

To recover under 29 U.S.C. § 2612(a)(1)(D), an employee must establish that (1) the employee suffers from a serious health condition; and that (2) such condition renders the employee unable to perform the functions of his or her job. 29 U.S.C. §2612(a)(1)(D). In light of these two factors, even though Thorson has established that her medical condition constituted a "serious health condition," she must still prove that the medical condition rendered her unable to perform the functions of her employment. Gemini argues that a genuine issue of material fact exists regarding Thorson's ability to work.

[Footnote continued from previous page]
cause these interim final regulations do not state that conditions such as minor ulcers do not ordinarily rise to the level of a serious health condition, the Secretary of Labor argues that Thorson "clearly and unambiguously had a serious health condition" under the interim final regulations. *See* Doc. #67, at 11.

Even if this Court were look to the final regulations for guidance in how to interpret the interim final rules, Thorson would still meet the regulatory criteria: she was incapacitated for more than three consecutive days, she saw her doctor at least twice, her doctor prescribed medication, and her doctor ordered further testing.

[5] Gemini also argues that this Court should not consider Thorson's summary judgment motion because it is untimely, but that argument is without merit. After this case was remanded from the Eighth Circuit Court of Appeals, the deadline for submission of motions for summary judgment in this Court was no later than November 5, 1997, and Thorson met that deadline.

Gemini relies on two different kinds of evidence to assert that a reasonable juror could find that Thorson could have returned to work during the week of February 7, 1994. First, even though Thorson's doctor advised her not to return to work during the week of February 7, 1994, Gemini points to a later evaluation of Thorson's condition made during the course of this litigation by a specialist hired by the defendant, Dr. Ray F. Miller. After reviewing Thorson's medical records and conducting an examination,[6] Dr. Miller concluded that there was not any "obvious indication as to why [Thorson's condition] would require Thorson to miss work." (Doc. #66, Exhibit E.) Gemini also relies on a psychological evaluation performed on the plaintiff nearly two years after the incident at issue, which asserts that Thorson has had a history of depression which mainly results in physical manifestations, and that consequently, Thorson reported a variety of major medical problems which ultimately turned out not to be serious.[7] *See* Cerhan's Psychological Evaluation, Doc. #66, Exhibit F. Gemini then uses this evidence to argue that even though Thorson's own physician advised her not to return to work, a jury could rely on after-the-fact opinions by the defendant's specialists to find that Thorson could have returned to work, despite her own doctor's orders.

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[6] Dr. Miller stated that his medical evaluation was based on "4 hours on record review, [and] 1 1/2 hours on history and physical examination with the patient in attendance." *See* Miller's Independent Medical Evaluation, Doc. #66, Exhibit E.

[7] As further evidence of this conclusion, Gemini asserts that Thorson once returned to work the day following an emergency trip to the hospital. (*See* Defendant Gemini's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Doc. #63, at 8.)

This Court has considered this argument and discussed it with defense counsel during the hearing on this motion. Upon further review, this Court still finds such a proposition unreasonable. When a doctor advises a patient not to return to work and the patient heeds that advice, a reasonable juror could not use an after-the-fact evaluation by another doctor, conducted two years after the incident, to decide that the plaintiff should have disregarded her doctor's advice and returned to work. When a doctor tells a person to stay home from work, the employee is justified in believing that she should not return to work, even though hindsight might prove otherwise.

Second, Gemini argues that even though Thorson's doctor gave her a "no work" medical excuse, that evidence does not necessarily mean that Thorson was unable to work because of her illness. To support this argument, Gemini cites *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159 (N.D. Ohio 1997) as standing for the proposition that a doctor's note stating "no work" is not necessarily enough to prove that the employee was unable to work. Contrary to the defendant's assertion, however, *Olsen* does not stand for so sweeping a proposition.

Olsen was a meter reader who went to the emergency room of a local hospital complaining of back and chest pain. *Olsen*, 979 F. Supp. at 1161. His treating physician wrote him a note (1) excusing him from work the next day, a Thursday, and (2) allowing him to return to work the following day, a Friday, as long as he only performed light duty. 979 F. Supp at 1161. Pursuant to this doctor's orders, Olsen stayed home from work on Thursday and returned to perform light work on Friday. 979 F. Supp. at 1161. He then saw his chiropractor, who issued an excuse that allowed Olsen to return to work for half days, doing light tasks. 979 F. Supp. at 1161.

The main question in *Olsen* was whether the court could consider Olsen's chiropractor's note in order to

calculate the number of days Olsen was incapacitated for purposes of the FMLA: relying only on the emergency doctor's note, Olsen was incapacitated for two days, which fell short of the FMLA's three-day requirement; relying on both the emergency doctor's note and on the chiropractor's note, Olsen was incapacitated for nineteen days, which met the FMLA requirement. In deciding which to rely upon, the *Olsen* court stated that even assuming that "light duty" was the equivalent of absence from work, Olsen's chiropractor was not acting as a health care provider within the meaning of the FMLA when he issued his "light work only" excuse. 979 F. Supp. at 1165. Thus *Olsen* does *not* stand for the proposition that a "no work" doctor's excuse may not be sufficient evidence to find that a plaintiff was validly excused from work. Rather, it stands for the proposition that a "'health care provider' must determine that, in his or her professional judgment, the employee cannot work (or could not have worked) because of the illness." 979 F. Supp. at 1166.

Applying this analysis to Thorson's case, this Court finds that a health care provider determined that, in his professional judgment, Thorson could not work because of her illness: a medical doctor examined her at least twice, prescribed medication, ordered further testing, and told her not to return to work. Because a reasonable juror could not find otherwise, Thorson has proven the second prong of her FMLA claim.

Conclusion

Thorson has put forth sufficient evidence to establish both prongs of her FMLA claim: she had a serious medical condition because she was incapacitated for more than three consecutive calendar days while also receiving continuing medical treatment for her illness, and her condition rendered her unable to perform the functions of her job. *See* 29 U.S.C. § 2612(a)(1)(D). Because defendant Gemini has failed to put forward evidence which a reasonable juror could rely upon to find

find that a genuine issue of material fact exists for trial, summary judgment on the issue of liability shall be granted in favor of plaintiff Thorson.

It is therefore ***ORDERED***,

Thorson's motion for summary judgment on the issue of liability is granted. A further evidentiary hearing will be set by separate notice to determine damages and any other relief that may be appropriate.

Done and Ordered this 9th day of March, 1998.

/s/

Michael J. Melloy, Chief Judge
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

APPENDIX C

29 U.S.C. § 2611. Definitions

As used in this subchapter:

* * *

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves-

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

* * *

29 U.S.C. § 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such

spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave On a reduced leave schedule, under subparagraph (C) or (D) of sub-section (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 work-weeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal

leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(l) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee-

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if

the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken-

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states-

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

29 C.F.R. § 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be "written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the an-

ticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

29 C.F.R. § 825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH-380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of "serious health condition" (see §825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or per form other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis *(i.e.,* part-time) as a result of the serious health condition (see §825.117 and §825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of §825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care

provider, a general description of the regimen (see §825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) Is unable to perform work of any kind;

(ii) Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see § 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) Must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis *(i.e.,* part-time), the probable duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized *(see* § 825.207), only the employer's lesser sick leave certification requirements may be imposed.

29 C.F.R. § 825.307 What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of *clarification* and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health

care is extremely limited *(e.g.,* a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

(d) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within two business days un less extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of ob-

taining the second or third medical opinions except in very unusual circumstances.

(f) in circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

29 C.F.R. § 825.308 Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly *(e.g.,* the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave

(including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly *(e.g.,* the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

Supreme Court, U.S.
FILED
JUL 27 2000
CLERK

(2)

No. 00-9

In The

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Thorson disagrees with the Statement of the Case as set forth by Petitioner Gemini, Inc. Gemini claims that the principle question in this case is whether the FMLA bars an employer from introducing after-acquired evidence to contradict an employee's FMLA claim because the employer did not go through the certification procedure. The District Court specifically allowed after-acquired evidence and took in to account the after-acquired evidence presented by Gemini before entering summary judgment for Thorson on the issue of liability. App., 35a-37a. The decision of the District Court in granting Summary Judgment after evaluating the medical evidence provided by Gemini was specifically addressed by the Eighth Circuit Court of Appeals and the decision of the District Court was upheld. App., 18a-19a. Further, at no time did the Court of Appeals expand the scope of the statute beyond the limits envisioned by Congress, but elected to follow the DOL's rules and regulations as has every other Court faced with the similar question. App., 12a-16a.

Factual Background

In addition to the factual background set forth by Gemini, Thorson would point to the following:

At the time Gemini terminated Thorson, Gemini had been presented two doctors orders telling Thorson not to work. App., 3a, 17a, 28a, 29a. Gemini made no inquiry as to Thorson's medical condition or no FMLA inquiry when it terminated Thorson on February 18, four days after she returned to work. App., 18a, 19a, 35a, 36a. No request for

a certification from her doctor was made, nor any request for independent medical examinations was made by Gemini, as allowed by the FMLA. App., 18a, 19a, 35a, 36a. Two years following Thorson's termination, during the course of this litigation, Gemini obtained medical opinions from two doctors, both which were presented by Affidavit and considered by the District Court at the time of the Thorson's Motion for Summary Judgment. App., 18a, 19a, 35a, 36a.

The Court Of Appeals' Decision

Thorson also takes dispute with Gemini's recitation of the Court of Appeals decision. Specifically, the Court of Appeals never held that after-acquired evidence could not be introduced nor did it ever bar Gemini from offering after-acquired evidence. In fact, just the opposite is true in that the District Court specifically commented on the after-acquired evidence which Gemini filed as exhibits to the Resistance to Motion for Summary Judgment. App., 35a, 36a. This same evidence was considered and discussed by the Court of Appeals in discussing the weakness of evidence obtained two years after the fact versus the contemporaneous examinations by Thorson's doctor. App., 18a, 19a.

REASONS FOR DENYING THE WRIT

I. The lower Federal and State Courts are not divided over the question whether employers may use after-acquired evidence to defeat an employee's FMLA claim and this is not an issue in this case.

To begin this argument, it must once again be pointed out that Gemini's position is factually incorrect. The District Court did allow after-acquired evidence, and the Court of Appeals commented on and ruled on the after-acquired evidence. App., 18a, 19a, 35a, 36a. The District Court held "When a doctor tells a person to stay home from work, the employee is justified in believing that she not return to work, even though hindsight might prove otherwise." App., 36a. The District Court found Gemini's reliance on two doctors' opinions conducted two years after the illness versus two contemporaneous examinations where the doctor advised his patient not to return to work did not generate a jury question. App., 36a.

The Court of Appeals specifically found in evaluating the after-acquired evidence "In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini can not show, with its evaluations made long after the fact, that there remains a genuine issue of material fact on the question of Thorson's capacity to perform her job." App., 19a.

This ruling is totally consistent with all of the Courts that have considered this specific issue. Specifically, in Gemini's cited case *Bauer v. Variety Dayton-Walther Corp.*,

118 F.3d 1109, 1112 (6th Cir. 1997), the Sixth Circuit, like the Eight Circuit allowed the after-acquired evidence. *Id.*

Where the authorities cited by Gemini, *Delong v. Trujillo*, 1 P.3d 195 (Colo. Ct. App.1999), *cert. granted* (May 30, 2000) and *Williams v. Rubicon, Inc.*, P.754 So. 2d 1081 (La. Ct. App. 1999), *writ denied*, 754 So. 2d 864 (La. 2000) and *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997) differ from this case is that they all dealt with the Certification process. At no time was the Certification process under FMLA at issue in this case, as Gemini did not request a Certification, did not request further medical evaluations, and did not even consider the medical condition of Thorson at the time it terminated her. App., 18a, 19a, 35a, 36a. The Eighth Circuit never held in that the Certification process is required and is the only way to present evidence. In fact, the Eighth Circuit discussed and reviewed after-acquired evidence that was introduced to the District Court at the time of the Summary Judgment Hearing. App., 18a, 19a. This case quite simply does not generate any issues that are divided between any courts.

II. The Court of Appeals did not hold that agency rule making is not constrained by Congressionally established limits.

A review of Eighth Circuit's opinion in this case shows that its analysis of this issue was exhaustive. The Eighth Circuit, began by citing the Senate report, "The term 'serious health condition' is not intended to cover short term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall

within even the most modest sick leave policies. Conditions or medical procedures that would *not normally* be covered by the legislation include minor illnesses which last only a few days . . . " Emphasis added. S. Rep. No. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30. The Report went on to hold "The definition of 'serious health condition' . . . is broad and intended to cover various types of physical and mental conditions." *Id.* The Eighth Circuit held "We do not believe this legislative history assists Gemini all that much. While Congress may have 'expected' that minor illesses 'normally' would not come within the definition of 'serious health condition', that does not mean such ailments can never be FMLA serious health conditions." App., 14a.

As the Eighth Circuit noted, Thorson's treating physician originally thought she was suffering from a peptic ulcer or gall bladder disease, conditions that would be quite serious under any definition. App., 15a. Until February 11, Thorson's physician believed she could have a potentially serious condition, which was not ruled out until March 9, long after Thorson had been terminated from her position by Gemini. App., 13a.

The Eighth Circuit's opinion in this case is consistent with each and every case decided under the FMLA with the Courts all applying the bright line/two prong test contained in the Code of Federal Regulations. In *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123 (8th Cir. 1997) the Court did the following analysis:

> "Uniformly, Courts applying the FMLA expressly or impliedly have required a showing of incapacity. See *Hodgens v. General Dynamics*

Corp., 963 F. Supp. 102, 106 (D.R.I. 1997) (holding no FMLA breach where employee's "condition did not prevent him from performing his job"), *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997) (recognizing the requirement of incapacity; holding plaintiff's shortness of breath and chest pains failed to meet the FMLA standard); *Rhoads v. FDIC*, 956 F. Supp. 1239, 1255 (D.Md. 1997) (denying employer's documented chronic health condition" caused "episodic periods of incapacity"); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 997-98 (N.D.Ga. 1996) (finding plaintiff's back injury to be a "serious health condition" because it "incapacitated (him) for three weeks"); *George v. Associated Stationers*, 932 F. Supp. 1012, 1015-196 (N.D.Ohio 1996) (finding a "serious health condition" where the plaintiff's communicable chicken pox prevented him from working for over three days); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D.Va. 1996) (noting incapacity requirement and granting employer summary judgment where condition would last ten days but where "the plaintiff was able to perform the functions of her position"); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D.Kan. 1996) (holding employer's refusal to grant leave did not violate the FMLA where the employee failed to prove that her condition "kept her from performing the functions of her job"); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310-11 (E.D.Ky. 1996) (finding no FMLA violation upon no showing of requisite incapacity period); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036-37 (M.D.Tenn. 1995) (holding employee's condition did not require FMLA leave because

> she was not "incapacitated for more than three calendar days," but employee's daughter's fever qualified because it kept her from day care); *Seidle v. Provident Mutl. Life Ins. Co.*, 871 F. Supp. 238, 243 (E.D.Pa. 1994) (requiring employee to demonstrate her child underwent "a period of incapacity requiring absence from his day care center for more than three days." *Id.*

Since *Martyszenko*, other Courts have continued to do the two prong/bright line analysis. See *Joslin v. Rockwell International Corporation*, F. Supp. 2d 1158, 1160 (N.D. Iowa 1998); *Albert v. Runyon*, 6 F. Supp. 2d 57, 61 (D.Mass. 1998); *Robert v. Human Development Association*, 4 F. Supp. 2d 154, 159 (E.D.N.Y. 1998); *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 1192, 1204 (S.D.Cal. 1998); *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159, 1163 (N.D. Ohio 1997); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998); *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997).

For this Court to accept Gemini's position, this Court would have to overrule each and every case set forth above. Gemini cites no cases where there is a conflict between the Eighth Circuit Court's decision in this case and any other decision.

In sum, Gemini has failed to provide any basis for this Court to exercise its discretion to grant certiorari. There has been no identification of a conflict, no error in interpretation or application of a Federal Statute and no broader purpose necessitating consideration of Gemini's claims by this Court. As a result a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth in this brief, this Court should deny the Petition for Writ of Certiorari as requested.

Respectfully submitted,

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Dated this 27th of July, 2000.

Supreme Court, U.S.
FILED
AUG 15 2000
CLERK

(3)

No. 00-9

IN THE

Supreme Court of the United States

GEMINI, INC.,

Petitioner,

v.

KATHERINE A. THORSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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RULE

SUP. CT. R. 10 1

REPLY BRIEF FOR PETITIONER

Respondent has identified no persuasive grounds for denying review in this case. Indeed, respondent fails to rebut the petition's showing that the decision below is inconsistent with cases from other circuits holding that after-acquired evidence can suffice to defeat an employee's claim of a "serious health condition" under the Family and Medical Leave Act ("FMLA"). Conceding that the rule of law in other courts is as stated in the petition, respondent attempts to avoid this issue by turning a blind eye to the holding of the court below. An examination of the court of appeals' opinion demonstrates, however, that the court held that an employer's after-acquired evidence is insufficient as a matter of law to rebut an employee's prima facie showing under the FMLA, thereby creating a circuit conflict with decisions of the Sixth and Seventh Circuits. As discussed herein, although a subsequent decision of the Eighth Circuit addresses the court of appeals' holding in this case, that recent decision fails to eliminate the potential for a continuing conflict with the law of other circuits on this significant issue.

In addition, respondent all but concedes that, as demonstrated in the petition, the decision below conflicts with precedents of this Court setting forth the principles of statutory construction that should govern this case. Accordingly, this Court's review is warranted. *See* SUP. CT. R. 10(a) and (c) (certiorari appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

I. Review Is Warranted Because The Court Of Appeals Held That After-Acquired Evidence Is Legally Insufficient To Rebut Employees' FMLA Claims

1. The court below held that an employer who fails to invoke the FMLA's optional medical certification mechanism effectively surrenders its right to challenge an employee's claim of entitlement to FMLA leave through the use of after-acquired evidence. In her brief in opposition, respondent asserts that the court below did not so hold. Instead, according to respondent, "the Court of Appeals commented on and ruled on the after-acquired evidence." Opp. 3 (citing Pet. App. 18a, 19a). Respondent's analysis is beside the point, however, because the rule of law adopted by the court below effectively precludes employers from obtaining summary judgment on the basis of after-acquired evidence.

The opinion of the court of appeals leaves no doubt on this point. After noting that Gemini did not invoke the medical certification process, the court of appeals expressly held that "in these circumstances, Gemini *cannot* show that there is a genuine issue of fact regarding [respondent's] incapacity during the February absences, *although it may have been able to do so (or even to prevail on this issue) had it availed itself of the protections provided for within the FMLA*." Pet. App. 18a (emphasis added); *accord id.* at 17a ("It may well be that [respondent's] illness did not actually require that she be absent from work, *but because the company did not resort to the protections for employers provided by the FMLA* to address just this sort of situation [*i.e.*, the optional medical certification process], there is no genuine issue of fact on this part of the 'serious health condition' question.") (emphasis added); *id.* at 19a ("In the face of the contemporaneous notes from Thorson's physician indicating that she was not to work, we agree with the District Court that Gemini *cannot show, with* its *evalua-*

tions made long after the fact, that there remains a genuine issue of material fact . . . .") (emphases added).

In short, the court of appeals repeatedly held that an employer "cannot" show the existence of a genuine issue of fact solely through the use of after-acquired evidence, not that Gemini "did not" make such a showing with the particular after-acquired evidence in this case. The court made clear that the reason for this inability to rebut the employee's prima facie showing was not some unstated flaw in the probative value of the evidence proffered by Gemini, but was instead "because the company did not resort to the protections for employers provided by the FMLA" (Pet. App. 17a) and sought to rely on "evaluations made . . . *after the fact*." *Id.* at 19a (emphasis added). To be sure, the court of appeals *mentioned* the after-acquired evidence presented by Gemini, but it did so only to express its conclusion that this evidence was legally insufficient to rebut respondent's claim to have suffered from a "serious health condition."

This reading of the court of appeals' decision is confirmed by the court's conclusion that summary judgment was appropriate because there was no genuine issue of material fact. The after-acquired evidence proffered by Gemini demonstrated that respondent had suffered from only "an upset stomach . . . without any significant gastrointestinal disease or pathology" and that there was no "obvious indication as to why it would require [her] to miss work." Pet. C.A. App. 495; *see* Pet. App. 19a. This evidence directly refuted respondent's claim to have suffered from a "'period of incapacity requiring absence from work'" (Pet. App. 8a (citation omitted)) and, if legally sufficient, would have raised a genuine issue of material fact that would have precluded entry of summary judgment for respondent. Thus, the court of appeals' judgment necessarily rests on its holding that Gemini's evidence was insufficient as a matter of law to create a jury issue because it was developed after the fact rather than through the contemporaneous certifica-

tion procedure. A rule that after-acquired evidence can be considered but is legally insufficient to rebut the plaintiff's prima facie case is, for all practical purposes, indistinguishable from a rule that precludes the introduction of such evidence, because under either rule the employer can never prevail on the basis of after-acquired evidence but is instead compelled to utilize the optional certification procedure. Thus, this rule conflicts with the decisions of the other courts of appeals cited in the petition, because those courts held that after-acquired evidence *can* create a triable issue of fact on the "serious health condition" issue.

A recent decision of the Eighth Circuit cites the decision below but does not eliminate the concerns raised by the opinion in this case. *See Stekloff v. St. John's Mercy Health Sys.*, No. 99-3016, 2000 WL 959613 (8th Cir. July 12, 2000). In *Stekloff*, the Eighth Circuit referred to the optional nature of the FMLA's medical certification process, and noted that an employer's failure to comply with that process would not result in a complete waiver of its right to contest an employee's assertion of a "serious health condition." *Id.* at *1. The court of appeals characterized the *Thorson* opinion as having "considered employer arguments that an employee did not have a serious medical condition in spite of the fact that no second opinion was sought." *Id.* However, the *Stekloff* court apparently was not squarely presented with the question whether after-acquired evidence is legally sufficient to defeat an employee's prima facie case; instead, the court was faced with a unique issue concerning the viability of a claim of a serious health condition when an employee is able to work in a similar job in another workplace, and the employee claims that her health condition is precipitated by conditions distinctive to her previous workplace. *Id.* at *2. The court ultimately seems to conclude as a matter of law that the employee established that she suffered from a "serious health condition." *See id.* at *4 ("Ms. Stekloff made a sufficient showing . . . which allows us to *conclude* that

she had a 'serious health condition.'") (emphasis added); *see also id.* ("Ms. Stekloff's leave is protected by the FMLA even if she was continuously able to work as a psychiatric nurse for some other employer."). It is difficult to discern what rule of law the Eighth Circuit would apply in future cases in light of the rather arcane and unrelated issue that arose in *Stekloff*. Further, *Stekloff* does not eliminate the circuit conflict created by the decision below, and there remains a significant amount of confusion as to the rule of law concerning the weight to be given to after-acquired evidence in FMLA cases.

2. As demonstrated above, in this case the court of appeals essentially decided that an employer who fails to invoke the FMLA's optional medical certification process is precluded from successfully using after-acquired evidence to rebut an employee's claim of a "serious health condition." Given that rule of law, which was not wholly disclaimed in *Stekloff*, the first question addressed in the petition is squarely implicated here, and respondent offers no arguments to the contrary. Indeed, respondent correctly concedes that the law in other circuits expressly permits employers to use after-acquired evidence to rebut a plaintiff's prima facie showing of a "serious medical condition." *See* Opp. 3-4 (conceding that in "*Bauer v. Variety Dayton-Walther Corp.*, 118 F.3d 1109, 1112 (6th Cir. 1997), the Sixth Circuit . . . allowed the after-acquired evidence").

Respondent attempts to distinguish *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997), on the ground that it "dealt with the Certification process," but that purported distinction is of no consequence. As explained in the petition, *Price* is consistent with the approach followed by the Sixth Circuit in *Bauer*, because the *Price* court contemplated the use of after-acquired evidence notwithstanding the fact that the employer failed to comply with the requirements of the FMLA medical certification process. Pet. 9. Thus, like the Sixth Circuit's decision in *Bauer*, the Seventh Circuit's

holding in *Price* is irreconcilable with the judgment in this case.

On the other hand, the holdings in *DeLong v. Trujillo*, 1 P.3d 195, 200 (Colo. Ct. App. 1999), *cert. granted*, (May 30, 2000), and *Williams v. Rubicon, Inc.*, 754 So. 2d 1081, 1084-87 (La. Ct. App. 1999), *writ denied*, 752 So. 2d 864 (La. 2000), are consistent with the approach of the court of appeals. To be sure, both of those cases involved the optional certification procedure, but the crucial point is that in both cases—as in the decision below—the practical effect of the employer's failure to follow the optional certification process to its conclusion was that the employer was precluded as a matter of law from challenging the employee's FMLA claim. *DeLong*, 1 P.3d at 200; *Williams*, 754 So. 2d at 1084-87.

II. The Decision Below, Which Permits An Agency To Adopt Rules Beyond The Authority Delegated To The Agency By Congress, Conflicts With The Clear Mandates Of This Court

Respondent similarly fails to rebut Gemini's showing that the decision below conflicts with this Court's clear directives regarding the limitations on agency rulemaking authority. The court of appeals' decision permits an agency to promulgate regulations beyond the authority delegated to it by Congress as long as the agency "reasonably decided" that exceeding Congressionally mandated limits "would be a legitimate tradeoff" for having an objective definition that could be applied uniformly. Pet. App. 16a. On this point, respondent simply notes that the opinion below contained an "exhaustive" analysis of this issue. Opp. 4. Respondent's characterization does not change the fact that the court of appeals upheld an agency regulation while essentially conceding that the regulation expanded the "serious health condition" category beyond the limits envi-

sioned by Congress. Pet. App. 16a. No matter how thorough the analysis that led to the court of appeals' conclusion, its holding directly conflicts with the precedents of this Court on an important issue of agency authority, and certiorari is therefore warranted.

Respondent asserts that acceptance of Gemini's view of the law would require this Court to overrule numerous lower court precedents. Opp. 5-7 (citing cases). That assertion is debatable,[1] but in any event it

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[1] Indeed, some of the cases cited by respondent note that the regulations exceed the limits envisioned by Congress, but find it unnecessary to choose between the regulations and the statute on the particular facts before them. For example, in *Beal v. Rubbermaid Comm. Prods. Inc.*, 972 F. Supp. 1216, 1223-26 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998) (table), one of the plaintiffs suffered from a minor back injury that arguably satisfied the regulatory criteria for a "serious health condition." *Id.* at 1223. The court noted, however, that "it is unlikely that Beal's relatively minor back injury is the type of injury Congress intended to cover under the FMLA." *Id.* The court expressed skepticism about its ability to interpret the regulations to expand the scope of the FMLA beyond the intent of Congress, but ultimately resolved the claim on another basis. *See id.* ("[E]ven if the court believed that it could stretch the limits of the FMLA so as to include Beal's back injury within the concept of 'serious health condition,' Beal has submitted no evidence to establish that Defendant interfered with the exercise of any rights he may have had under the FMLA."); *see also Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1036 n.8 (M.D. Tenn. 1995) ("When considered together with the legislative history, the Department of Labor's test will include many more ailments than Congress intended the FMLA to cover. Furthermore, the regulation excludes spe-

[Footnote continued on next page]

does not refute the justifications for granting review in this case. Indeed, if large numbers of lower courts are, like the court below, choosing to disregard this Court's precedents regarding the limitations on the lawmaking authority of federal agencies, the need for immediate review is even more compelling. Accordingly, this Court should grant review in order to reaffirm the principle, rejected by the court below, that an agency may not exceed the rulemaking authority delegated to it by Congress in the interests of administrative efficiency or ease of application. *See Sullivan v. Zebley*, 493 U.S. 521 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[Footnote continued from previous page]
cific illnesses such as the flu, while providing FMLA protection to those that are arguably less serious.").